

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

No. 10,237

THE TEXAS COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REVIEW.

ALBERT E. VAN DUSEN,
135 East 42nd Street,
New York City, N. Y.,

J. A. McNAIR,
929 So. Broadway,
Los Angeles, California,

FILED
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PAUL P. O'BRIEN,
CLERK

Attorneys for Petitioner,
The Texas Company.

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To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, The Texas Company, respectfully shows and alleges:

I. That your petitioner is, and at all times hereinafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and qualified to do business as a foreign corporation in the States of Montana, Idaho and Arizona; and that it is now and at all times hereinafter mentioned has been transacting business in the said States of Montana, Idaho and Arizona, and within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

II. That heretofore and on or about September 3, 1938, upon charges filed by the National Maritime Union of America, Port Arthur Branch (hereinafter called the "Union"), the respondent, National Labor Relations Board (hereinafter sometimes referred to as the "Board"),

issued a complaint against your petitioner alleging that your petitioner had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act (hereinafter sometimes referred to as the "Act"), 49 Stat. 449, in that your petitioner had (1) discharged and refused to reinstate certain seamen, (2) through its officers, agents and employees, made various statements to its employees discouraging affiliation in or activity on behalf of the Union, and (3) denied passes to representatives of the Union to board petitioner's vessels to contact members of the Union, all in violation of said Act.

III. That on or about September 12, 1938, your petitioner duly served and filed its answer and amended answer to said complaint in which your petitioner denied that it had engaged in or was engaging in any unfair labor practices or had violated the Act as alleged in said complaint.

IV. That issue having been joined in the said proceeding between the Board and your petitioner, a hearing was held at Port Arthur, Texas, from September 12 to 16 and from September 19 to 22, 1938, before Howard Myers, a Trial Examiner duly designated by the Board, and a further hearing was held also at Port Arthur, Texas, on November 28 and 29, 1938, before Charles E. Persons, another Trial Examiner duly designated by the Board.

V. That at the opening and close of the Board's case and at the close of the entire case, your petitioner duly moved to dismiss the Board's complaint and all proceedings thereunder on the ground that no cause of action was alleged or proved, but said motions were denied by the Trial Examiner.

VI. That on or about May 8, 1939, Trial Examiner Myers filed his Intermediate Report, in which he found and concluded that petitioner had engaged in unfair labor prac-

ties and in which he recommended that petitioner take certain affirmative action to remedy the situation brought about by such unfair labor practices, including reinstatement with back pay of four seamen.

VII. That on October 24, 1939, oral argument of counsel was had before the Board upon the issues of fact and of law in said proceedings, in which argument counsel for your petitioner prayed that said complaint and the proceedings thereunder be dismissed upon the grounds set forth in petitioner's various motions to dismiss and in petitioner's exceptions to the Trial Examiner's Intermediate Report and upon the further ground that neither the acts of your petitioner alleged in said complaint nor the acts of your petitioner as shown in the testimony or other evidence at the hearing constituted any violation of the National Labor Relations Act, 49 Stat. 449, or of any other law or statute, the enforcement of which is entrusted to the Board.

VIII. That on or about January 24, 1940, the said Board did make and file its decision and final order in the said proceedings, which decision and order was served on your petitioner by mail on January 24, 1940.

IX. That on or about May 7, 1940, a petition for a review of the aforesaid order and decision was filed with this Court and on June 24, 1940, the Board filed an answer thereto requesting enforcement of its order.

X. Upon briefs filed by petitioner and the Board, and after oral argument in which petitioner and the Board participated by counsel, this Court, on May 23, 1941, entered its opinion (now officially reported in 120 F. (2d) 186), and a decree denying enforcement of the Board's aforesaid order as to one Clarence Buckless, a seaman, and remanding the remaining portions of such order to the Board for reconsideration in the light of the Court's opin-

ion and particularly certain maritime safety statutes to which the Court adverted in its opinion.

XI. That on June 28, 1941, and pursuant to this Court's opinion and decree above referred to, the Board vacated and set aside its decision and order of June 24, 1940, with the exception of paragraph 2(a) thereof, and, pursuant to notice served upon the petitioner and the Union, a hearing for the purpose of reargument was held before the Board in Washington, D. C. on July 17, 1941, at which hearing the petitioner and the Union were represented by counsel.

XII. Thereafter, or on July 18, 1942, the Board handed down a decision signed by only two members of the Board, by which your petitioner was ordered to:

“1. Cease and desist from:

(a) Discouraging membership in National Maritime Union of America, Port Arthur Branch, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment, or any terms or conditions of their employment, because of membership or activity in any such labor organization;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed by Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to J. Gordon Rosen immediate and full reinstatement to the position held by him on July 14, 1938, or to a substantially equivalent position, without prejudice to his seniority or other rights and privileges;

(b) Make whole J. Gordon Rosen for any loss of pay he may have suffered by reason of respondent's discrimination in regard to his hire and tenure of employment by payment to him of a sum of money equal to the amount which he normally would have earned as wages,—including the reasonable value of his maintenance on board ship,—from April 19, 1938, to June 1, 1938, and from July 14, 1938 to the date of the respondent's offer of reinstatement, less his net earnings during such periods;

(c) Immediately post notices to its employees in conspicuous places on its docks and vessels, and maintain such notices for a period of at least sixty (60) consecutive days from the date of posting, stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1(a) and (b) of this Order; (2) that the respondent will take the affirmative action set forth in paragraphs 2(a) and (b) of this Order; and (3) that the respondent's employees are free to become or remain members of National Maritime Union of America, Port Arthur Branch, and that the respondent will not discriminate against any employee because of his membership in or activity in behalf of said organization;

(d) Notify the Regional Director for the Sixteenth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply therewith."

XIII. That the Board's aforesaid decision and order are erroneous in fact, unauthorized and insufficient in law, and ought to be reviewed and set aside by this Court for the following reasons:

(1) The said decision and order of July 18, 1942, and the findings of fact and conclusions of law of the Board upon which the said decision and order are based, are not in accordance with law, are contrary to the evidence, are without evidence to support them, and are not supported or warranted by substantial or credible evidence;

(2) In its said decision and order the Board has failed to give due consideration to the opinion of this Court handed down on May 23, 1941, and to the maritime safety legislation discussed and adverted to in said opinion.

(3) The acts of petitioner as shown by the testimony and evidence do not constitute a violation of the National Labor Relations Act;

(4) The Board erred in finding and concluding that your petitioner, by anti-union statements and in other ways, interfered with, restrained and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8(1) and 8(3) of the Act;

(5) The Board erred in finding and concluding that your petitioner warned its employees against organization, threatened to discharge Union members and questioned an employee about membership in the Union and thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the said Act;

(6) The Board erred in finding and concluding that your petitioner discharged J. Gordon Rosen from the *S.S. Nevada* because of Union activities;

(7) The Board erred in finding and concluding that your petitioner discharged J. Gordon Rosen from the *S.S. Washington* because of Union activities;

(8) The Board erred in directing petitioner to cease and desist and to take affirmative action as specified in the Board's aforesaid decision and order and to post notices to such effect.

WHEREFORE, your petitioner prays this Honorable Court to review and set aside the decision and order of the National Labor Relations Board herein referred to, and to grant

petitioner such other and further relief as to the Court may seem just and proper.

Dated: August 28, 1942.

THE TEXAS COMPANY
By JAMES TANHAM
Vice President.

ALBERT E. VAN DUSEN,
135 East 42nd Street,
New York City, N. Y.,

J. A. McNAIR,
929 So. Broadway,
Los Angeles, California,

*Attorneys for Petitioner,
The Texas Company.*

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JAMES TANHAM, being duly sworn, deposes and says: That he is an officer, to wit, Vice President, of THE TEXAS COMPANY, the petitioner named in the foregoing petition; that he has read the foregoing petition by him subscribed as such officer and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein related to be alleged on information and belief, and as to those matters he believes it to be true.

JAMES TANHAM

Subscribed and sworn to before me }
this 28th day of August, 1942. }

SUSAN B. GIFFORD

Notary Public, Kings County

[SEAL] Clerk's No. 669, Register's No. 3263
N. Y. Co. Clerk's No. 605, Reg. No. 3G374
My Commission Expires March 30, 1943

